repay (which, I agree, it normally does), evidence of a "borrowing" is *pro tanto* evidence of a contract which is precisely what the statutes preclude. The act of payment and the circumstances which enable the payer to reclaim the money are not adequately expressed by the word "borrowed" alone. It is only necessary to glance at *Bullen and Leake* to see how widely different in form are claims for repayment of money lent and claims on an implied contract. The defences which can be raised also differ widely. If the respondent had clearly pleaded in implied contract, the appellant might well have raised quite different defences. It may be that, although Choi Poh could have bound the appellants contractually, the obligation under implied contract would be confined to him personally. Such points were not considered at the trial, since they were never raised. The learned trial Judge rightly treated the action as one of contract and contract only. While fully appreciating the desirability of putting an early end to the litigation between the parties, I think that to give judgment at this stage on a basis of implied contract might be to deprive the appellants of valuable rights of defence. It is to be observed that the learned trial Judge made no finding that the money was actually received or used by the appellant firm. No such finding was necessary to the conclusion which he reached, and the question was not fully tried. For this purpose production, or at least a formal demand for production, of the firm's books would be essential. If in fact the money was not "had and received" by the appellant firm as such, I doubt very much whether the respondent could obtain judgment against anyone other than Choi Poh. I do not think this Court ought to make a finding on this issue of fact.

If the claim were against Choi Poh alone, he could have no defence to a claim for $4,000 as money had and received, and in that case I should not allow a defect of form in the plaint to prevent us from giving judgment against him in order to put an end to the litigation. Where, however, there is at least a possibility that the firm might successfully defend an action for money had and received, and the claim has never been properly before the Court on that basis, I think they must be given the opportunity so to defend. Without prejudice, therefore, to any future claim by the respondent on that basis, I think the appeal should be allowed with costs here and below, that the judgment of the Court below should be set aside, and that the deposit should be paid out to the appellants' Solicitors.

Order accordingly.

M. PAKIAM v. Y. P. DEVATHANJAM.

[Court of Appeal (Pretheroe, Ag. C.J., Thomson and Briggs, JJ.) February 16, 1952]

[Ipoh — F.M. — Civil Appeal No. 48 of 1951]

Confused plaint — New trial.

The Court of Appeal found that the plaint was confused and unsatisfactory and that the trial Judge had based his decision on a ground which was not tenable; the appeal was allowed and (Briggs, J. dissenting) an order was made striking out the plaint, liberty being given to file a fresh plaint.

Cases referred to :—

(1) *Ong Ee Lim v. The Government of the Federated Malay States* (1937) M.L.J. 40 at 44; (1936) F.M.S.L.R. 239 at 248.
(2) *Davy v. Garrett* 7 Ch. 473.
(3) *Mohummud Z. A. Khan v. Mussumat Thakoranee Rutta Koer* 11 Moore Ind. App. 468 at 473.
(4) *Foster v. Mackinnon* L.R. 4 C.P. 754.
(5) *Raffles v. Wichelhaust* (1864) 2 H. & C. 906.
(6) *Whincup v. Hughes* L.R. 6 C.P. 78.
(7) *Canada Rice Mills, Ltd. v. Union Marine & General Insurance Co.* (1941) A.C. 55, 65; (1940) 4 All E.R. 169 at 174.
(8) *McGovern v. James Nimmo & Co.* (1937) S.C. 473.

COURT OF APPEAL.

M. Edgar for the appellant.

S. M. Sharma for the respondent.

The facts and arguments appear sufficiently from the judgments.

Cur. Adv. Vult.

Pretheroe, Ag. C.J. : — The appellant was a party to a rubber tapping contract on the Gunong Panjang Estate, Gopeng. In November, 1950, this contract was assigned by the appellant to the respondent. How the negotiations for this assignment originated is not clear as the evidence of the parties is in direct conflict and the learned trial Judge, for a reason which will appear later, made no finding of fact on this point. A few days after this assignment an agreement in writing was prepared at the request of the respondent and duly executed by both parties. The following day the Estate was sold and the tapping contract thus terminated.

Thereupon the respondent instituted an action against the appellant claiming the return of the consideration given for the assignment.

The plaint filed was most unsatisfactory. The third paragraph sets out four statements alleged to have been made by the defendant to the plaintiff and it appears that they are alleged to be fraudulent misrepresentations. But neither the words "fraudulent misrepresentation" nor the word "representation" appear and it is not even alleged that the statements were false. The statement of defence denied "the allegations in paragraph three of the plaint." At the hearing no issues were framed and no application was made either to amend the plaint or to have it amended. It is apparent from the final address of counsel for the defendant that he did not know if he was defending a suit in tort or in contract for he cited *Ong Ee Lim v. The Government of the Federated Malay States*[1] where a submission to this effect by counsel was successful. The learned Judge reserved judgment and later found that "there was a complete misunderstanding and mistake between the parties as to the nature of the transaction between them and what was actually being transferred from one to the other." On this ground the learned Judge declared "the transaction void *ab initio*" and entered judgment for the plaintiff in the terms prayed in the last paragraph of the plaint and awarded him costs.

In my opinion that decision cannot be sustained. At the hearing mutual mistake was not mentioned until counsel for the plaintiff made his final address and when, of course, it was too late for counsel for the defendant to reply on this point. It follows that defendant lost his action on an issue which had not been pleaded and which he had not defended. "A defendant may claim *ex debito justitiae* to have the plaintiff's case presented in an intelligible form" per James, L.J. in *Davy v. Garrett*[2] at page 486. Also I am not satisfied that the mistake, if any, was mutual. The assertions made by plaintiff in paragraph three of his plaint and his evidence before the Court seem to negative any mistake on his part. For these two reasons I would allow this appeal.

Having arrived at that conclusion I find it difficult to decide what order should be made. In view of the decision taken by the learned trial Judge it was not necessary for him to decide any facts regarding the allegations of fraud and he did not do so. This Court has not seen or heard the witnesses so that any decision on the facts taken by us might result in a miscarriage of justice. If a new trial were ordered there would still be the difficulty presented by the embarrassing nature of the plaint. For these reasons I would follow the precedent provided by *Davy v. Garrett*[2] *supra*. I would allow the appeal and strike out the plaint and grant the respondent liberty to file a fresh plaint within one month. I would allow appellant his costs in this court but would not award costs to either party in the Court below because plaintiff made no application to amend the plaint and defendant made no application to have it amended. The sum of $500 deposited in Court by the appellant should be paid out to him.

There was no appeal against the decision on the counterclaim so that decision stands.

Thomson, J. : — I have had the advantage of reading the judgment of the learned President. I would express my agreement with what he has said and my concurrence with the conclusion at which he has arrived which, if I may say so with all respect, seems to me to be in accordance with the attitude of the Privy Council to appeals from the Indian Courts as stated by Sir James Colvile in the following passage from the judgment of Their Lordships in the case of *Mohummud Z. A. Khan v. Mussumat Thakoranee Rutta Koer*[3]:—

> "Though this Committee is always disposed to give a liberal construction to pleadings in the Indian Courts, so as to allow every question fairly arising on the case made by the pleadings to be raised and discussed in the suit, yet this liberality of construction must have some limit. A plaintiff cannot be entitled to relief upon facts or documents not stated or referred to by him in his pleadings."

I wish, however, to add certain observations of my own.

Not only were the pleading in the case in the state of chaos which my Lord has described but the evidence abounded in conflicts of an extremely intractable character. It is clear that in this confused and turbulent stream in which he found himself beset the learned trial Judge thought he had found a rock on which he might build firm some conclusion in the agreement between the parties dated 27th November, 1950, the terms and the execution of which were admitted by both sides. Had I been able to agree with him on this point I should have been extremely reluctant to interfere with the conclusions at which he did arrive. Unfortunately, however, I am regretfully compelled to say that I am not able to agree.

It is not necessary for the purposes of what I have to say to set out in detail the whole of that agreement of 27th November, 1950. The material parts of it, however, are that in consideration of a sum of $10,500, receipt of which is acknowledged, the appellant "hands over charge" of the tapping contract to the respondent.

It goes on to say that the respondent is to carry on the contract for a period of three months and have all the income from it and, in effect, that at the end of three months the appellant is to have the option of resuming the benefit of the contract on refunding the sum of $10,500 paid by the respondent.

The trial Judge, in his judgment, referred to the portion of the agreement which gave the respondent the option to take back tapping contract after three months, and said "one has to look no further" than that provision :—

"To find why the plaintiff must succeed in this claim, for that paragraph clearly shows that the defendant was transferring to the plaintiff something that did not exist, as the defendant's contract with the estate was, at its very highest, on a monthly basis.

Whether the defendant fraudulently misrepresented the situation to the plaintiff or misrepresented it in the genuine belief that his contract was safe for months, if not years, is in my opinion immaterial for there was complete misunderstanding and mistake between the parties as to the nature of the transaction between them and what was actually being transferred from one to the other. This, in my view, renders the transaction void ab initio."

He arrived at this result from consideration of a single provision in the agreement between the parties but even if regard be had to the agreement as a whole, I do not think it can be supported.

There is not a single word in the agreement as to the duration of the tapping contract the assignment of which it purported to effect, and though it may well be that the option provision shows that the parties anticipated that it would still be in existence in three months time and therefore made provision for dealing with it then, it far from follows as an available, far less a necessary, inference that they were under the impression that its nature was such that it would necessarily be in existence at, the end of that time. That, to my mind, would be tantamount to saying that where A buys a horse from B and as part of the contract of sale it is agreed that B shall have the option of re-purchasing the horse in three months time it must be said that both parties were under the impression that the creature must necessarily survive long enough for the option to become exercisable. It requires, I think, no show of authority to say that the parties to a contract must be held to be aware of the ordinary facts of human experience and to have them in mind when contracting with each other, and it is just as much a fact of human experience that a contract is liable to termination as it is that a horse is liable to the ordinary fact of mortality. It may well be that a particular agreement relating to a horse may contain some warranty as to the creature's continued existence for a period of time, and it may well be that a particular agreement relating to a contract may contain some warranty relating to its duration. Such considerations, however, do not arise here because as I have already observed, there is nothing whatever in the agreement in this case that says anything as to the duration of the tapping contract or the circumstances in which it could be terminated. The only reference to my mind that can be drawn from the insertion of the option provision is that both parties expected the tapping contract would continue in existence for more than three months. Assuming for the sake of argument that they both did genuinely entertain such an expectation, can it be said that that was anything more than an erroneous opinion as to the value of the tapping contract which formed the subject matter of the agreement? And such an erroneous opinion, by virtue of the "Explanation" to section 21 of the Contract Ordinance, "is not to be deemed a mistake as to a matter of fact"?

The rock on which the trial Judge thought he could safely build having thus proved to be but shifting sand, I can see no course open but that proposed by the learned President and I would accordingly deal with the appeal as proposed by him.

Briggs, J. : — The appellant, who was defendant in the Court below, was a tapping contractor on an estate at Gopeng. He was paid twenty cents per pound tapped and five cents per pound for scrap and his profits were from $300 to $400 per month. His contract was on a month to month basis and he had been working under it for some three years. There was no resident manager or clerk and the appellant was in *de facto* control of the estate, except during periodic visits by Mr. Wilkins, the Manager. In 1950 the owner of the estate wished to sell it, and as early as July a definite offer was made by a purchaser. It may, I think, fairly be assumed that the purchaser inspected the estate before making this offer. If he did so, he would in the normal course have seen the appellant and discussed matters with him. On or about 10th November, 1950, a Chinese had seen Mr. Wilkins at the estate with a view to purchasing it, and on 28th November, 1950, he had made an offer to buy and an agreement for sale was reached. The transfer was delayed for some time, but apparently possession was given almost at once. I am of opinion that this Chinese must also have inspected the estate before making his offer. Although Mr. Wilkins did not discuss the owner's intentions, or any terms of the intended sale, with the appellant, and although the appellant himself has denied it on oath, I believe that on or before the 10th November, 1950, the appellant

was aware that the estate was in the market and likely to be sold in the near future. He may not have known who was likely to become the owner, but he must have realised that the new owner might wish to work the estate himself, and that in consequence there was at least a substantial possibility that within a short time after 10th November, 1950, the tapping contract would be determined.

On or about 10th November, 1950, the appellant and the respondent had an interview at which they agreed that the respondent should acquire from the appellant the benefit of the tapping contract on certain terms. The respondent alleges that he was induced to make that agreement by fraudulent misrepresentations of the appellant to the following effect :—

(1) that the tapping-contract was for a fixed term of five years, of which two were expired;

(2) that it was a term of the tapping-contract that the contractor might retain certain quantities of rubber and that in consequence the profits on the contract were currently as high as $4,000 per month.

This the appellant denies.

The respondent had no previous experience of tapping contracts and it may be assumed that he expected to make very large profits out of this one, for he paid to the appellant on the 15th November a sum of $3,000 and in addition on the 27th November executed promissiory notes in favour of persons alleged to be debtors of the appellant for a total of $7,150, and returned to the appellant a promissory note of his own for $350 making a total consideration of $10,500. This consideration was apparently agreed upon orally on the 10th November.

The agreement was not for an outright sale of the benefit of the tapping contract. According to the respondent, the appellant said he had obtained a very profitable contract on an estate in Kedah, in consequence of which he would not be able to work at Gopeng for the next few months and would need substantial working capital. To provide for this he was prepared to assign the Gopeng contract, with a proviso that after three months he might redeem it by repaying the consideration. If he did not redeem at that time, the assignment was to become absolute.

The first step was to obtain the concurrence of Mr. Wilkins, and with this in view the parties saw him on the 15th November. They had according to the respondent concocted a story, which bore no relation to the facts as he understood them, to the effect that the appellant wanted to go to India and that the respondent was his brother and would take over the work for three months during his temporary absence. This interview is of great importance and the evidence concerning it, together with the written contract to which I shall shortly refer, is in my opinion the best of the credibility of the parties' evidence generally.

Mr. Wilkins agreed to the respondent taking over the contract and thereupon the parties both signed a memorandum stating that he had taken over with effect from 15th November. The $3,000 was also paid over, but before the remainder of the consideration passed the parties executed on or about 27th November a contract in writing, which must be taken as the definitive agreement between them, superseding all previous oral agreements and determining, apart from questions of mistake, fraud or misrepresentation, their mutual rights and liabilities. The respondent admits that he personally gave the instructions for this document to the draftsman. It is perhaps remarkable, in view of his oral evidence, to find that it recites that the appellant is going to India for a short stay. It is certainly remarkable that there is no reference to a fixed unexpired period for the tapping contract. The respondent also swore that the tapping contract was contained in a written agreement which the appellant had shown to him. Yet there is no reference to any such document in this contract. The substance of the contract is that the respondent is to perform the tapping contract for three months from 27th November, 1950, and retain the profits; at the end of that period the appellant may either :—

(1) pay $10,500 and take over the tapping-contract again, or

(2) retain the $10,500, the assignment of the tapping contract then becoming absolute.

There is also a provision that if the appellant, not having repaid the $10,500, "shall cause the said (tapping) contract to be cancelled and he takes over the tapping contract" he must repay the $10,500. This seems to refer to a possible attempt by the vendor to get the benefit both of the money and of a new tapping contract, by persuading the manager to determine the current one. It clearly does not relate to cancellation of the tapping contract by the management without intervention of the vendor. That contingency is not referred to in any way in any part of the contract. Only three days later, on 30th November, the management informed the respondent that the estate had been sold and that his services would not be required any longer. Presumably he would have been entitled to a month's profits in lieu of notice, and Mr. Wilkins says he offered him $300, but no point has been made of that. The appellant originally contended that the contract was terminated because of mis-

conduct on the part of the respondent, but this quite incorrect contention was abandoned later. It is not suggested by either side that the cancellation of the contract was other than lawful.

The respondent sued for $3,350, being the $3,000 paid in cash and $350 on the appellant's promissory note, and for the return of his own promissory notes for $7,150 or indemnity against his liability thereon. The learned trial Judge gave judgment in his favour accordingly. The defence relied on the terms of the contract, and denied the allegations of misrepresentation. The pleadings were not elegant, but I think the plaint made it sufficiently clear that the respondent claimed to be entitled to avoid the conract on the several grounds of fraud and misrepresentation and probably in addition that it was void on grounds of mistake. I should add at this stage that the defendant raised a counterclaim. The learned trial Judge dismissed this. The appellant did not press this aspect of the matter and ultimately abandoned this part of his appeal; but some parts of the evidence given on the counterclaim are of importance on questions of credibility.

The judgment, if I understand it rightly, proceeded on the basis that the defendant purported to assign to the plaintiff the benefit of a tapping contract which must subsist for at least three months, and that, since the tapping contract was only on a monthly basis, this proved the existence of a mistake in the mind of the purchaser (though not necessarily the vendor) concerning the subject matter of the transaction so fundamental as to prevent the parties from ever being *ad idem*. Where mistake of that kind exists in the mind of one party its effect is of course that no contract ever comes into existence at all, and neither section 21 nor section 23 of the Contracts (Malay States) Ordinance, 1950, is in point. The relevant provision is section 13. See *Pollock and Mulla* on the Indian Contract Act, 6th edition, page 84 *et seqq*.

It is necessary first to see whether the facts, including the terms of the document itself, justify the learned trial Judge's view that no contract ever came into existence. It may be that the parties had quite different expectations as to the probable continuance of the tapping contract, but, with great deference to the learned trial Judge, I am of the opinion that that was not such a discrepancy of intention concerning the subject matter of the contract as would render the parties not *ad idem* and prevent the formation of a contract. Whether under the rule in *Foster v. Mackinnon*[4] or under the rule in *Raffles v. Wichelhaust*[5], the mistake must be of a much more fundamental character than this to enable this Court to say that no agreement was in fact reached. Here the parties knew what they were dealing with, and both intended to deal with the same thing. Even if the respondent honestly believed that the tapping contract could not be determined for a specific period, whether three months or two years, that mistake was not sufficient to render the intended contract a nullity. I am quite unable to accept that there was any mutual mistake which would have rendered the contract void under section 21 of the Ordinance. The whole case was fought on the basis that the appellant, knowing all the facts, wilfully misled and over reached the respondent. I hold, therefore that a valid contract was formed. The contract as a document and its terms are admitted. It is not an unlawful contract. Even if in the recitals facts are stated which are known to either or both parties to be untrue, that is no ground for disregarding the operative terms of the document.

The first question in construing it is whether the circumstances of the transaction and the wording of the document give rise to an implied term that the consideration shall be repayable if the tapping contract does not subsist for at least three months. Such a term is not to be implied lightly, but only if it is necessary to give effect to the true intentions of the parties, i.e. of *both* parties. I do not think such a term should be implied. I think if it had been inserted the defendant would almost certainly have refused to sign. I think the plaintiff was buying an asset of exceedingly uncertain value, but knew this perfectly well and was prepared to take his chance. The wording of the document undoubtedly suggests that the parties, or at least the plaintiff, expected the tapping contract to continue, but that is quite different from saying that the defendant warrants that it will continue.

It may be suggested, that, if that term is not to be implied, another must be implied to the effect that, if the tapping contract is prematurely determined, further performance of the contract is to be excused, and that the first may as readily be implied as the second. But I think that argument is unsound. It is not necessary to imply a term, but merely to apply the normal rules as to supervening impossibility. See section 57(2) of the Contracts Ordinance. If the tapping contract ceased to exist there would be no further duty on the respondent to "carry on the said tapping contract for a period of three (3) months." But that does not entitle him to refund of payments already made under the contract. This was not a case where the consideration *wholly* failed, for the purchaser

had the benefit of the contract for a few days at least. The rule in *Whincup v. Hughes*[6] is still law in this country.

I proceed then on the basis that the contract was lawfully made, that the consideration paid thereunder is not repayable under any express or implied term thereof or under any rule as to frustration, and that the contract is not void or voidable on grounds of mistake. It remains to enquire whether it was voidable on grounds of fraud or misrepresentation.

I am unable to ascertain from the wording of the judgment whether the learned trial Judge found as a fact that there had been misrepresentation of some kind, but made no finding whether that misrepresentation had been fraudulent or innocent, or whether he refrained from making any finding at all on the issue whether or not any misrepresentation had been made. His language is open, I think, to either interpretation. If he found that there was misrepresentation, he did not specify what it had been, but he appears to have had in mind an incorrect statement that the contract was not subject to termination, at least within the period of three months. In the circumstances, and with great deference to the other members of this Court, who have reached a different conclusion, I think this Court should attempt to form its own view of the facts. Unless this view appears to be in conflict with those of the learned trial Judge, no difficulty need arise.

As to the alleged fraud, Counsel for the respondent did not press before us the allegations concerning the supposed profit of $4,000 per month. Indeed he hardly mentioned them. I think they must be untrue. It is common ground that Mr. Wilkins on 15th November explained to the parties for the respondent's benefit the financial basis of the tapping contract. The most elementary calculations must have shown the respondent that a profit of $4,000 per month could not conceivably result. Also it is clear that he can have been under no illusions about receiving any rubber for his own benefit. If he was going to make $4,000 per month, it would have had to be by means outside the terms of the contract and of doubtful legality, and he must, I am convinced, have known this. Even if the representation was made, it clearly could not have caused him to enter into the contract, since he must have known after the 15th November that it was untrue. Counsel relied almost entirely on the alleged statement that the tapping contract had a fixed term of two years to run. If such a statement was made, it was undoubtedly fraudulent and, if the respondent believed or acted on it, the conract was voidable.

I am content to base my findings on this issue on the evidence of Mr. Wilkins, whose credit was not attacked in any way by either side. The defendant's conduct in the case generallly has not been such as to instill much confidence in his denial, and for reasons which will appear I do not believe the plaintiff's evidence. On his own showing he was prepared to deceive Mr. Wilkins as to his relationship with the defendant, and as to the defendant's future plans, in order to get the contract. He said describing the interview with Mr. Wilkins on 15th November :—

> "Mr. Wilkins will not deny that I told him defendant said he had a five year contract."

If he had said anything of the kind to Mr. Wilkins, Mr. Wilkins must immediately have disputed that. In fact, Mr. Wilkins said :—

> "There was no mention of two years of the contract still to run or of the contractor retaining any rubber or of $4,000 a month. I think plaintiff understood the conditions and agreed to take the work."

This appears to me directly to contradict the respondent's account of the matter. Further inferences may be drawn from the fact that the two years is not mentioned in the written agreement, and from the fact that when the contract was abruptly determined the plaintiff apparently made no protest whatever to Mr. Wilkins. Most tapping contract are on a monthly basis and I am not satisfied that the plaintiff ever thought, or was told, that this was anything else. He probably expected that it would continue for a substantial period. In this belief he was prepared, for reasons which appeared sufficient to him, to pay a substantial sum for it.

I am inclined to think that the plaintiff's real complaint against the defendant is that the defendant sold him the contract well knowing that, so far from being likely to continue indefinitely, it was likely to be cancelled at any time in consequence of a sale of the estate, a fact of which the plaintiff was ignorant. I might be prepared, if it were necessary, to find that this was the case, but I do not think it could help the plaintiff. Under the exception to section 19 of the Contract Ordinance, mere silence, even if amounting to fraud, does not render the contract voidable if the party had the means of discovering the truth with ordinary diligence. It would have been simple and natural in the ordinary way for the plaintiff to say to Mr. Wilkins, "I know this is a monthly contract only, but, as I am paying a large sum for it, may I have an assurance that there is no reason why it should not continue indefinitely?". Mr. Wilkins would

naturally have replied, "You must not assume that: we are trying to sell and, if we do, you may have to go at any time." The only reason for not making this enquiry was that the parties were combining to deceive Mr. Wilkins as to the relations between them. In view of this, the plaintiff has no one to blame but himself if he acted on a false assumption.

I would refer shortly to certain evidence adduced upon the counterclaim. Mr. Wilkins, supporting the defendant's evidence, said :—

"Plaintiff complained that labourers owed him money. I asked them. They admitted. I asked them to pay in monthly instalments. I asked purchaser to let plaintiff come in to collect."

Arunasalam, Govindasamy and Manickam all gave evidence of having owed money to the defendant at the time when the plaintiff took over, that the defendant asked them to pay the plaintiff instead, and that the plaintiff in due course collected or tried to collect the money from them. They are now independent of both parties. I think this evidence proves beyond doubt that on this point also the plaintiff's evidence was untrue. He said, "I did not agree to be responsible for any money owed by (the labourers) to the defendant", and claimed that the money paid by Arunasalam was in repayment of money lent by himself. This is relevant now only on the issue of the plaintiff's credibility.

In the result, I am of opinion that no fraud or misrepresentation of such a nature as to entitle the respondent to avoid the contract was ever proved, and I see no reason to abstain from such a conclusion as conflicting with any finding of the learned trial Judge based on the oral evidence. However harshly this contract may have worked out, it was valid and lawful, and it is not for this Court to rewrite it. If it cannot be avoided, it must stand. I think the defendant made a bargain so good as to be thoroughly immoral. I think that only the conscious misconduct of the plaintiff in attempting to deceive Mr. Wilkins prevented him from knowing that that was the case (if indeed he did not know it and act from some indirect motive.)

I would therefore allow this appeal and would not order a retrial. As however, I have the misfortune to differ on this point from the learned President and my learned brother Thomson, I add a few words in deference to their views. On the question of the pleadings, I agree entirely that, if the defendant had applied at a proper stage for an order that the plaintiff should amend his plaint, he would have been entitled to such an order on the principles enunciated in *Davy v. Garrett*[2]. He did not apply, but chose to incur the risk of being taken by surprise at the trial, which may have been a bold course, but can hardly be regarded as blameworthy. It is not the duty of the defendant to see that the plaint is in such a form as to satisfy the Court's requirements. If he was satisfied to defend the suit as brought (I agree, defectively) against him, and if he did so defend it, in the sense that the plaintiff is unable to satisfy this Court that he proved any valid case to the Court below, I think the appellant should not be penalized by an order for a retrial unless it is absolutely essential. Such a case arises where, for example, the plaintiff had established by evidence a *prima facie* case, which was dismissed in the Court below on a point of law later held on appeal to be erroneous, the defendant's evidence not having been heard. But where the evidence of both parties has been fully heard, I think this Court should make every effort to supplement the findings of the learned trial Judge, if it proves necessary. Fraud is no doubt a special case, in that appellate Court is especially reluctant to find fraud where the Court below has not done so, but that rule does not apply to a finding that there was no fraud. In *Canada Rice Mills, Ltd. v. Union Marine and General Insurance Co.*[7], Lord Wright said :—

"On this latter point their Lordships would feel justified, if it were necessary, to act upon Order LVIII., r.4, of the Rules of Court of British Columbia. That rule is identical with Order LVIII., r.4, of the Rules of the Supreme Court in England, which gives the Court of Appeal power (inter alia) to draw inferences of fact, and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require, as well as to receive further evidence. The rule is intended to obviate a new trial in cases where such a course can properly be avoided, and applies even in cases tried with a jury. In the present case the jury have found that there were perils of the sea during the period while the ventilators were closed. What is wanting is the finding that there was not merely concurrence in time, but that the perils of the sea caused the closing."

* * * * * *

In the present case the Court of Appeal in British Columbia regarded themselves as precluded from going beyond a narrow reading of the findings of the jury by a decision of the House of Lords in McGovern v. James Nimmo & Co.[8], where Lord Atkin said that the Court cannot itself supply an answer to a missing question. That decision was, however, in an appeal from the Scotch Courts, where there is no rule corresponding to Order LVIII., r.4, and where the Appellate Court has only the record and verdict before it. In their Lordships' judgment, the decision in McGovern's case cannot in view of Order LVIII., r.4, be applied to English or British Columbia appeals.

I think the sentence underlined should encourage this Court to say that no actionable fraud or misrepresentation was proved, where such a finding does not conflict with any finding of the learned trial Judge. It is true that we cannot see the witnesses, but I think the plaintiff's case may be rejected on the three grounds, that certain matters in it show him to be worthy of belief generally, that the circumstances show his story to be inherently improbable, and that the evidence of Mr. Wilkins, whose independence and veracity he did not attempt to question, directly contradicts it.

Order accordingly.

L. STANLEY v. G. B. BULL.

[Orig. Civ. Juris. (Wilson, J.) November 6, 1951]

[K.L. — Originating Motion No. 16 of 1951]

Landlord and tenant — Certiorari — Motion for an Order of — Rent Control Ordinance, No. 6 of 1948, ss. 12 and 13.

The landlord of premises applied to the Rent Assessment Board for permission to apply to a Court to eject a tenant who at the date of the application was not in occupation himself or by any member of his family but, in fact, was on leave in England and some other unknown person was in occupation. The Board refused permission. On a motion for an order for the issue of the writ of certiorari, —

Held, that the issue of the writ of certiorari is strictly a matter of discretion and the Court in order to ascertain whether it is proper or not to grant the remedy may take into consideration not only the conduct of the applicant but also the circumstances of the case. As in the present case the tenancy had not been determined according to law, the application was refused.

Cases referred to :—

(1) *Rex v. Stafford Justices, ex parte Stafford Corporation* (1940) 2 K.B. 33.

(2) *Rex v. Surrey Justices* 5 Q.B. 466.

MOTION for an Order of Certiorari.

R. Ramani for the applicant.

M. Edgar for the respondent.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Wilson, J. : — This is an Originating Motion for an Order of Certiorari that the proceedings before the Rent Assessment Board in the Municipal Area of Kuala Lumpur in Application No. 33 of 1951 be brought up before this Court and quashed.

The facts are that the respondent was the tenant of No. 88 Klang Road, Kuala Lumpur, and in my opinion, he still is. The applicant is the landlord of the premises. The landlord applied to the Rent Assessment Board under section 12 of Ordinance No. 6 of 1948 for the permission of the Board in writing to apply to a Court for an Order of Ejectment of the tenant. Under section 13 of the Ordinance no order or judgment for the recovery of possession of any premises comprised in any tenancy shall be made or given except in certain cases. In this case the applicant asked for an order or judgment for the recovery or possession of the premises on the grounds that neither the tenant nor any member of his family was in occupation of the premises or any part thereof (section 13(1)(i)). Evidence was given before the Rent Assessment Board from which it is clear that at the time of the hearing the respondent was on leave in England and some unknown army officer was, in fact, residing in the house. It has been argued by Mr. Ramani that it was not open to the Rent Assessment Board to consider or give any decision on the question of whether or no the respondent, whose furniture was still in the house, was still in occupation of the premises; that this is entirely a matter for the Court, and that they should therefore have given their permission for the applicant to apply to a Court for an Order of Ejectment.

In *Rex v. Stafford Justices, ex parte Stafford Corporation*[1] Sir Wilfrid Greene, M.R. in the course of his judgment stated as follows :—

"Now, in my opinion, the order for the issue of the writ of certiorari is, except in cases where it goes as of course, strictly in all cases a matter of discretion. It is perfectly true to say that if no special circumstances exist, and if all that appears is a clear excess of jurisdiction, then a person aggrieved by that is entitled ex debito justitiae to his order. That merely means this, in my judgment, that the Court in such circumstances will exercise its discretion by granting the relief. In all discretionary remedies it is well known and settled that in certain circumstances — I will not say in all of them, but in a great many of them — the Court, although nominally it has a discretion, if it is to act according to the ordinary principles upon which judicial discretion is exercised, must exercise that discretion in a particular way, and if a judge at a trial refuses to do so, then the Court of Appeal will set the matter right. But when once it is established that in deciding whether or not a particular remedy shall be granted the Court is entitled to inquire into the conduct of the applicant, and the circumstances of the case, in order to ascertain whether it is proper or not proper to grant the remedy sought, the case must in my judgment be one of discretion."

It is to be noted that the learned Master of the Rolls stated that the Court in order to ascertain whether it is proper or not proper to grant the remedy sought may take into consideration not only the conduct of the applicant but also the circumstances of the case. At page 44 he refers to the judgment of Blackburn, J. in *Rex v. Surrey Justices*[2], but then continues with the following sentence :—

"I do not read the observations in that judgment with reference to the right of the party aggrieved ex